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IN THE

Supreme Court of the United States

No. 332

OCTOBER TERM, 1954

HERBERT BROWNELL, JR., Attorney General, as Successor to the Alien Property Custodian, *Petitioner*,

v.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions below are printed at pages 15-28 of the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

In the opinion of respondent, the question presented is:

Whether the Congress, without redefining the word "debt" as used in the Trading With the Enemy Act, overruled *Miller* v. *Robertson*, 266 U.S. 243 (1924), and thereby precluded payment of interest on debt claims by changing certain provisions as to the disposition of residual funds remaining after the payment of such debt claims and other costs of administration.

STATUTES INVOLVED

Relevant provisions of the Trading With the Enemy Act, as amended, are set forth in Appendix B of the Petition, at pages 29-43.

STATEMENT

The facts are not in dispute and respondent concurs in the statement set forth in the Petition, pages 2-4.

ARGUMENT

The petitioner, as successor to the Alien Property Custodian, has paid the principal of the debt due to respondent from J. A. Henckels, K.G., a national of Germany, and has allowed the pre-vesting interest on this debt at the stipulated rate of 3.25% per annum. Thus, as stated by the Court of Appeals (Petition, page 17), "we are presented with the single question of whether or not, as a matter of law, the amended Act authorizes payment of *post*-vesting interest, as well as *pre*-vesting interest, to a creditor whose claim matured prior to the outbreak of hostilities and whose statutory right to recover the principal amount is conceded." As the Court of Appeals said (Peti-

tion, page 17), "there was a matured debt with a contract provision for interest running from Henckels to appellee", now respondent.

This case turns on the effect of the World War II amendments to the Trading With the Enemy Act, hereinafter sometimes called the Act. The specific question is "What constitutes a debt?" Neither the old Act nor the amendments contains a definition.

Petitioner must concede that under the decisions which followed World War I a "debt" included full contractual interest, both pre-vesting and post-vesting. But petitioner argues that the World War II amendments, without redefining the word "debt", overruled the World War I decisions and thereby precluded payment of post-vesting interest. There is nothing in the Congressional history to support this argument and nothing to support it in any of the cases which have considered the World War II amendments.

Much as we might enjoy the privilege of arguing the case before this Court, the decision below is clearly correct and we see no reason for certiorari.

THE DECISION BELOW IS CLEARLY CORRECT

Petitioner opens his "reasons for granting the writ" by stating that the decision of the Court of Appeals runs counter to the well-settled rule that the United States is not to be required to pay interest in the absence of express statutory provisions therefor. The statement is only half complete. It should say, as do the cases which petitioner cites in footnote 1, "in the absence of an express provision in the relevant statute or contract." Petitioner then says, "The proceeding is clearly a suit against the United States." These arguments are not new. They were advanced and rejected in the World War I cases.

As we said before, the World War II amendments do not redefine the word "debt". Neither the old Act nor the amendments contains a definition, but the decisions which

followed World War I held that a "debt" included full contractual interest, both pre-vesting and post-vesting.

The then Alien Property Custodian argued, as petitioner does now, that the "suit is against the United States" and therefore payment of interest is prevented under the doctrine of sovereign immunity. This contention was rejected in *Miller* v. *Robertson*, 266 U.S. 243 (1924). The Court said at page 257:

> "While the suit, as held in *Banco Mexicano* v. *Deutsche Bank*, 263 U.S. 591, 603 (affirming 289 Fed. 924) is one against the United States, the claim was not against it. No debt was alleged to be owing from it to the plaintiff. The rule of sovereign immunity from liability for interest [citing cases] does not apply."

To the same effect see *Hicks* v. *Guinness*, 269 U.S. 71 (1925), where the Court said at page 81:

> "The denial of interest for the time covered by the war seems to us wrong. The cause of action had accrued before the war began, *Young* v. *Godbe*, 15 Wall. 562, and after it had accrued the question was no longer one of excuse for not performing a contract, but of the continuance of a liability for damages that had become fixed. The obligation of a contract is subject to implied exceptions, but when a liability is incurred by wrong or default it is absolute. Interest is due as one of its incidentals, and inability to pay it no more excuses from that than it does from the principal amount. Of course, while the damages remain unpaid, interest during one time is as necessary as interest during another to effect the indemnification to which the delinquent is held by the law. There are indications that local and momentary interests have led to a diversity of decisions, but here again what we regard as principle has prevailed in later days [citing cases] * * *."

Each of these cases held that the claimant was entitled to full interest, and the World War II amendments afford no basis for a different result.

The pertinent portions of the old Act were in Section 9(a) and read:

> "That any person not an enemy or an ally of an enemy * * * to whom any debt may be owing * * * may institute a suit in equity to establish the debt so claimed * * *."

The pertinent portions of the amendments are in Section 34(a) and read:

> "Any property or interest vested in or transferred to the Alien Property Custodian * * * shall be equitably applied by the Custodian in accordance with the provisions of this section to the payment of debts owed by the person who owned such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian. * * *"

We see no basis for the argument that a "debt" within the meaning of Section 34(a) is any different from a "debt" within the meaning of former Section 9(a). Apparently the Congress did not intend any difference. *Senate Report No. 1839,* 79th Congress, 2d Session, states at page 4:

> "Section 34 is not a radical departure from the treatment of debt claims in World War I since the principles of payment and of judicial determination are preserved. There is no intent to depart from established judicial precedents in this field with respect to such matters as to what constitutes a 'debt' except where express changes would be made by Section 34. The principal change is from 'first come, first served' to 'equitable distribution'."

House Report No. 2398, 79th Congress, 2d Session, has the same statement on page 10.

Despite such evidence of Congressional intent, petitioner contends that the theory of the statute has been changed and therefore the meaning of the word "debt". He says, on page 6 of his Petition, that the Act at the time *Miller*

v. *Robertson* was decided had "a conservatory purpose" but that "an entirely different philosophy underlies the World War II amendments." Petitioner in effect argues that the Congress by mere implication changed the "established judicial precedents * * * as to what constitutes a 'debt'."

The argument of change by implication also is not new. It has been advanced and rejected before in connection with the World War II amendments.

In *Markham* v. *Cabell*, 326 U.S. 404 (1945), the Government argued that the 1941 amendment to Section 5(b) of the Act had impliedly nullified the right of a creditor to maintain a suit under Section 9(a); this was prior to the adoption of Section 34(a). The Court rejected this argument, saying at pages 410-411:

> "We have concluded that however meritorious these considerations are, they raise questions of policy for Congress. We are concerned only with the right to sue on a debt under §9. Congress granted that right to some claimants and withheld it from others. Whether its choice was wise or not is not for us to say. The right to sue, explicitly granted by §9(a), should not be read out of the law unless it is clear that Congress by what it later did withdrew its earlier permission. We can find no indication in the 1941 legislation that Congress by amending §5(b) desired to delete or wholly nullify §9(a)."

The same argument was advanced in *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480 (1947), where the Government contended that the amendment to Section 5(b) had nullified the remedy for the return of property under Section 9(a). Again this contention was rejected, the Court saying at pages 486-487:

> "Petitioner therefore suggests that once the seizure is shown to be permissible under §5(b), there is no remedy for the return of the property under §9(a). It is said that §9(a) was designed to provide an ultimate judicial determination of the question whether

the property seized was within the vesting power defined in §5(b). *Central Trust Co.* v. *Garvan*, 254 U.S. 554, 567-568. The argument accordingly is that since §5(b) allows seizure and vesting of 'any property or interest of any foreign country or national thereof,' a suit to reclaim it is defeated by a mere showing that the claimant is a corporation organized under the laws of another nation.

"That is to make the right to sue run not to 'any person not an enemy or ally of enemy' as §9(a) in terms provides but to 'any person not an enemy or ally of enemy or national of any foreign country'. That would wipe out all suits to reclaim property brought by any foreign interest, no matter how friendly. We stated in *Markham* v. *Cabell*, 326 U.S. 404, 410-411, 'The right to sue, explicitly granted by §9(a), should not be read out of the law unless it is clear that Congress by what it later did withdrew its earlier permission.' Such a drastic contraction, if not complete sterilization, of §9(a) as petitioner suggests should therefore be made only if no other alternative is open."

In *Guessefeldt* v. *McGrath*, 342 U.S. 308 (1952), the Government argued that the Congress in 1948 adopted a policy of non-return and thereby prohibited the restoration of vested property to a national of Germany, resident in Hawaii. This argument was based on the theory that new Section 39 was an implied amendment of the portion of Section 9(a) which permitted a non-enemy to bring such a suit. The court rejected this argument and held that plaintiff was entitled to sue.

The Court of Appeals in the decision below followed the same theory and refused to read out of the law the right of the respondent to receive full contractual interest. In other words, the Court below refused to redefine the word "debt" merely by implication. The decision below not only is in accord with the three cases cited above but also is in accord with the two more recent cases which have said that the Act, as amended, is still for the protection of American creditors.

In *Clark* v. *Allen*, 331 U.S. 503 (1947), the Court was concerned with the right of German nationals to inherit California real estate. In discussing this problem the Court said at page 511:

> "But more important, vesting does not necessarily deprive the alien enemy of all benefits of his inheritance. If he owes money to American creditors, the property will be applied to the payment of his debts."

And in *Zittman* v. *McGrath*, 341 U.S. 471 (1951), sometimes referred to as the *Second Zittman case*, the Court considered the right of the Custodian to possession of accounts which had been subject to prior attachments in the New York State Courts. In upholding the Custodian's right to "possession", the Court said at pages 473-474:

> "While the statute under which the funds are to be 'held, administered and accounted for' authorizes the vesting of such foreign-owned property in the Custodian and its administration 'in the interest of and for the benefit of the United States,' it is not a confiscation measure, but a liquidation measure for the protection of American creditors. It provides for the filing and proving of claims and states that the funds 'shall be equitably applied' for the payment of debts. If the Custodian disallows a claim, or if he disallows a claim of priority where claims exceed assets, the claimant may seek relief in the United States District Court for the District of Columbia. The transfer of possession of these funds does not purport to work any automatic deprivation of rights of any class of creditors, but takes over the estate for administration."

The footnotes to the above quotations from *Clark* v. *Allen* and *Zittman* v. *McGrath* both refer specifically to new Section 34 of the Act. There is no suggestion that the meaning of the word "debt" has been changed.

The core of the arguments advanced by the petitioner is that property in his hands as successor to the Alien

Property Custodian is essentially property belonging to the United States and that, therefore, creditors' claims to recover debts owed by the enemy debtors are claims against the United States. Petitioner would place the present action in the same category as one to recover on an obligation of the United States; in other words, that contrary to *Miller* v. *Robertson, supra,* the claim is *now* against the United States.

The difficulty in reading such a drastic change into the statutory scheme lies not only in the expressed Congressional intent not to depart from established judicial precedents with respect to such matters as what constitutes a "debt" but also in the fact that if the Congress had wished to preclude payment of contractual post-vesting interest it could have said so. As this Court pointed out in the footnote on page 316 of the Opinion in *Guessefeldt* v. *McGrath, supra,* the Congress at one time considered suspending payment of all debt claims—principal as well as interest. But there were two ends to be served. One—unchanged by the amendments—was the policy of payment of "debts" owed by enemy debtors to American creditors. The other—substantially changed by the amendments—was the disposition of the residue, i.e., as stated in Section 39 of the Act, "the net proceeds remaining upon the completion of administration, liquidation and disposition pursuant to the provisions of this Act."

Petitioner's discussion of changes in the Act as to the disposition of the residue contains nothing which bears directly upon the payment of debt claims. Petitioner cites legislative history and other authority regarding changes in the rights of enemy aliens but none as to any changes in the rights of American creditors. Lacking such authority petitioner falls back on the proposition that interest is not paid on claims against the United States.

Petitioner argues that the United States is actually the debtor. The obvious weakness in the argument is that the United States is no more the debtor under the present

statute than it was before. The United States still has no independent liability of any kind. Petitioner, as successor to the Alien Property Custodian, is first a custodian who, as stated in the *Second Zittman case, supra,* "takes over the estate for administration." Just as any executor or administrator he must first pay obligations incurred by the person whose estate he has taken over for administration before he can dispose of the residue.

The obligation to pay in the present case did not arise under any contract with the United States. Payment does not come out of any Congressional appropriation, but, as stated in the first sentence of Section 34 (d), "only out of" property which was "owned by the debtor".

If the United States were the "debtor", if the claim were against it, then the value of the vested property would be immaterial. Fortunately, the net proceeds from the vested property are more than enough for full payment of repondent's claim, including both pre-vesting interest and post-vesting interest. But if the money available from the Henckels property "for the payment of debt claims against the debtor' had been insufficient respondent could not look to the United States for the deficiency but, as stated in the second sentence of Section 34(d), would be limited to "ratable payments". Clearly the United States is not the "debtor" today anymore than it was under the old Act. To paraphrase *Miller* v. *Robertson, supra,* no debt is owing from the United States to respondent and "the rule of sovereign immunity from liability for interest does not apply."

The decision below is clearly correct. The Court of Appeals properly refused to depart from the established judicial precedents as to what constitutes a "debt" and, like this Court treated the present statute as "a liquidation measure for the protection of American creditors." *Zittman* v. *McGrath, supra.*

THERE IS NO CONFLICT OF DECISION

Petitioner does not claim any conflict of decision and we know of none. The only other World War II case dealing with post-vesting interest is *Kay* v. *McGrath* decided in 1950 by Judge McGuire of the United States District Court for District of Columbia. This is the case cited by the hearing examiner (Petition, page 26) as the basis for his decision denying post-vesting interest.

Kay v. *McGrath* affirmed a denial of post-vesting interest on an alimony claim. However, Judge McGuire's memorandum opinion, a copy of which is set forth as a supplement to this brief, discusses contractual interest and says:

> "*Miller* v. *Robertson*, 266 U.S. 243, 257, 258 * * * is still controlling * * *."

As the Court of Appeals pointed out in the decision below (Petition, page 21), *Kay* v. *McGrath* does not purport to abrogate *Miller* v. *Robertson* "when, as in the present situation, interest flows from contract."

IMPORTANCE OF QUESTION

Petitioner states, on page 13 of the Petition, that "the question presented has substantial importance." It does, to a limited number of people in a limited number of situations. Admittedly, this case does not involve any constitutional issue. And, in our opinion, does not involve any question of general consequence or national importance. We believe that the decision of the Court of Appeals is correct and see no need for a decision by this Court.

CONCLUSION

As stated in *Senate Report No. 1839, supra,* Congress did not intend "a radical departure from the treatment of debt claims in World War I". Section 34 preserved "the principles of payment and of judicial determination".

There was "no intent to depart from established judicial precedents in this field with respect to such matters as to what constitutes a 'debt' except where express changes" were made.

The cases which followed World War I held that a "debt" included post-vesting contractual interest. Obviously these cases are the "established judicial precedents" to which the Senate and the House reports both referred. There is no express change regarding interest in Section 34. Therefore, we must conclude that the Court of Appeals correctly decided that a "debt", within the meaning of Section 34, includes post-vesting contractual interest.

Further, in our opinion, the questions involved are not of sufficient general consequence or importance to warrant certiorari.

Respectfully submitted,

SAMUEL B. STEWART, JR.,

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E. F. COLLADAY,
Attorneys for Bank of America National Trust and Savings Association, Respondent.

Dated October 5, 1954.

SUPPLEMENT

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 456-49

ANITA KAY, as Administratrix of the Estate of Dorothy Krets Lehmann, deceased, *Plaintiff*,

v.

J. HOWARD MCGRATH, Attorney General of the United States of America, Successor to the Alien Property Custodian, *Defendant*.

[This is an action instituted by plaintiff's decedent under section 34 (e) of the Trading With the Enemy Act, as amended, for review of the determination of the defendant, acting through the Director of this Office, dated December 8, 1948, disallowing her claim insofar as it sought interest from and after November 11, 1942, the date of the vesting of the enemy debtor's property. The Director had concluded that section 34 did not permit interest on debt claims accruing after vesting of the debtor's property since a claim under section 34 was one against the United States and section 34 contained no provision for the payment of interest on claims (see *Matter of Dorothy Krets Lehmann*, Claim No. 3848).]

MEMORANDUM

I do not think it can be gainsaid that interest in its nature is money paid for the use of money or for forbearance in demanding it when due—and that wherever it is allowed either by common law or by statute, it is allowable by reason of delay or default of the debtor—except where there is a contract to pay the same. *U.S.* v. *Sherman*, 98 U.S. 565.

There is no debtor-creditor relationship here, and no agreement upon the part of the Government to pay interest, so plaintiff's claim is without merit and fails as a consequence.

Those cases dealing with the payment of interest where the Government is the holder of the money under various federal statutes, reveals no case in which interest was allowed, *except* where *prior* to the Government succeeding to the custody of the debtor the latter had *wrongfully* withheld the funds in question. Factually this case falls without that category. *Miller* v. *Robertson*, 266 U.S. 243, 257, 258, supports this view, nor does any subsequent change in the law affect it—the case is still controlling and alluding as it does to the general principle here referred to.

Counsel will prepare necessary papers.

/s/ MATTHEW F. MCGUIRE
Judge

November 6, 1950